Office of Chief Counsel
Internal Revenue Service

memorandum

CC:TEGE:NEMA:BAL:PostF-147364-01
RWDenick

date: OCT 15 2001

to: Vincent A. Fusco, Jr.
Group Manager (EO 7920)(Philadelphia)

from: Deputy Area Counsel (TE/GE:NEMA) Baltimore
(Tax Exempt and Government Entities)

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subject: [redacted]

DISCLOSURE STATEMENT

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This responds to your request for advice on whether the (1) execution of Forms 872 and SS-10, extending the statute of limitations until [redacted], by an unenrolled return preparer, after payment in full has been made, constitutes valid statute extensions; and (2) execution of an Agreement to Assessment and Collection of Additional Tax by an unenrolled return preparer constitutes a valid assessment agreement where it was executed at the time payment is made.

FACTS

As we understand the facts, from your memorandum to our office and through conversations between you and Ms. Denick of our office, your office examined [redacted] (the "Club"), an organization exempt under I.R.C. § 501(c)(7), for calendar year [redacted] and for all four quarters pertaining to Form 941, employment tax returns for [redacted], [redacted], and [redacted]. The Form 990 (Return of Organization Exempt from Tax) for [redacted] is to be closed "no change," with appropriate advisories issued and the Form 941 for the first three quarters of [redacted] are also to be closed "no change." The fourth quarter of Form 941 for [redacted] is to be closed "Agreed Tax Change" in the amount of $[redacted].

The Club was represented during the course of its examinations by [redacted], an unenrolled return preparer, who was the taxpayer's representative pursuant to a Form 2848 (Power of Attorney and Declaration of Representative). The Form 2848 was dated [redacted]. On the back page of Form 2848, [redacted] signed under the designation of "unenrolled return preparer" and the Club's President signed the form on behalf of the Club. On the front page, in section 5 the acts authorized include the authority to sign any agreements, consents or other documents. The Club did not list any specific or deletions to the acts other authorized in the Form 2848 as it left that section blank.[1] Form 2848 notes on the front page that "in general, an unenrolled preparer of tax returns cannot sign any document for a taxpayer." There was no indication on the form that there were any powers of attorney that were being revoked or changed or that any previous power of attorney (if it existed) was to remain in effect.

On or about [redacted], [redacted] executed Form 2504 (Agreement to Assessment and Collection of Additional Tax and Acceptance of Over-assessment)(Excise or Employment Tax) on behalf of the Club with respect to additional tax for employment taxes for taxable years ending December 31, [redacted], [redacted], and [redacted]. The Form 2504 was accompanied by a check also dated [redacted], signed by the President of the Club, payable from the bank

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[1] There appears to be no dispute that the organization intended for the unenrolled return preparer to exercise such authority, particularly as the individual had represented the organization since the organization's inception. The return preparer indeed prepared the organization's Forms 990 (Return of Organization Exempt from Tax) as well as the organization's Form 1024 (Application for Recognition of Exemption).

account of the Club in the amount of $[redacted], with the notation that it was for [redacted] payroll."[2] The Form 3244-A (Payment Posting Voucher-Examination) shows a transaction received date of [redacted], with the Code 640 (advance payment on deficiency). The taxpayer's transcript of account shows that this amount was posted on [redacted], with the code number 640.[3]

Because the agent examining the returns was unable to close the case due to unforseen personal circumstances, she secured statute extensions from the Club, extending the period for assessment until [redacted]. Specifically, on [redacted], [redacted], the unenrolled return preparer, executed Forms SS-10 (Consent to Extend the Time to Assess Employment Taxes) and 872 (Consent to Extend the Time to Assess Tax), respectively[4].

As pertinent here, if the Consent to Extend is not valid, the statute of limitations with respect to the assessment of employment taxes for the period ending December 31, [redacted], expired on [redacted]. The amount of deficiency in employment taxes, although paid by the taxpayer in [redacted], has never been assessed.[5] The taxpayer has not requested a refund and has not disputed that the tax is owed.

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[2] The Form 2504 signified agreement that additional employment tax was owed for taxable years ending December 31, [redacted] and [redacted], in the amount of $[redacted] for each year. The statute of limitations for those years expire on [redacted] and [redacted], respectively. Those years are not at issue here.

[3] According to the ADP and IDRS 2001 information booklet, code number 640 credits the tax module with an advance payment of a determined deficiency and states that "overpayment interest is never allowed on TC 640" and that "overpayment interest is not allowed even if the deficiency is subsequently abated in whole or in part."

[4] On [redacted] the extensions were signed by an authorized representative of the Internal Revenue Service, Vincent Fusco, Jr. on behalf of Steven T. Miller, Director, Exempt Organizations Division.

[5] The statute of limitations with respect to the Club's Form 990 expired on or about [redacted]. However, there are no deficiencies with respect to that return.

ANALYSIS

Section 6201(a) of the Internal Revenue Code (the "Code") provides that the Secretary or his delegate is authorized and required to make the assessment of all taxes (including interest).

Section 6401(a) of the Code provides that the term "overpayment" shall include the payment of any part of the tax assessed or collected after the expiration of the applicable period of limitation. Section 6402(a) provides that in the case of any overpayment, the Secretary or his delegate, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of a internal revenue tax on the part of the person who made the overpayment and shall refund any balance to such person.

Section 6501 of the Code provides, in part, that taxes imposed by the Code shall be assessed within three years after the date the return was filed, unless prior to the expiration of this period a written agreement between the Commissioner and the taxpayer had been executed pursuant to section 6501(c)(4) to extend the assessment period.

Prescribed in Rev. Proc. 81-38, 1981-2 C. B. 592, are the standards of conduct, the scope of authority and the circumstances and conditions under which an unenrolled individual preparer of returns may exercise the privilege of limited practice as a taxpayer's representative before the Internal Revenue Service. Such revenue procedure, which modified Rev. Proc. 68-20, 1968-1 C.B. 812, derives from Treasury Department Circular No. 230 relating to practice before the Internal Revenue Service.

Section 5.02 of Rev. Proc. 81-38, supra, states that executing consents to extend the statutory period for assessment or collection of a tax, as well as executing waivers of restriction on assessment or collection of a deficiency in tax are beyond the scope of authority permitted an unenrolled preparer.

In the case of Griffiths v. Commissioner, T.C. Memo. 1988-445, a case involving similar facts to those in the instant case, an unenrolled return preparer, under a power of attorney, signed Forms 872 (Consent to Extend the Time to Assess Tax). Once the notice of deficiency was issued, the taxpayer attempted to argue that the statute of limitations on assessment had expired because the consents were invalid on the ground that the unenrolled

return preparer did not have the power to execute such a statute extension pursuant to 31 C.F.R., Part 10 (Circular 230) and Rev. Proc. 68-20, supra, the predecessor of Rev. Proc. 81-38.

In the Griffiths case, the Tax Court rejected the petitioner's argument, noting that although the signing of the consent by the unenrolled return preparer was beyond the scope of his authority and that such consent was accepted erroneously by the Commissioner, it was the taxpayer who violated the revenue procedure. The court wrote, "The revenue procedure does not require respondent to do anything. It requires the taxpayer to do something, i.e., to be represented by a person with certain credentials." 56 T.C.M. (CCH) 220, 226 (1988).

In finding the consents valid, the Tax Court went on to state:

> The fact that respondent's agent knew Reisenberg was not an enrolled agent does not change the result. The revenue procedure is directory, not mandatory. Respondent would have been justified in refusing to accept the consents signed by Reisenberg. The converse is not true. Petitioner can not ignore the revenue procedure by allowing his accountant to sign the consents and then claim the consents are invalid because respondent accepted them. The bottom line is that the respondent did not take any action contrary to either the regulation or the revenue procedure.

Id.

Based on the reasoning in the Griffiths case, we conclude that the consents executed in this case are valid and that the statute of limitations on assessment has been extended to [redacted].

However, even assuming that the consents were not valid, and the statute of limitations expired on [redacted], we note that section 6501(a) has been applied to tax collected but not assessed. For example, in Meyersdale Fuel Co. v. United States, 44 F.2d 437 (Cl. Ct. 1930), cert. denied, 282 U.S. 860 (1931), the court upheld tax collections which were never assessed, explaining that "taxes may be and often are collected without assessment." Therefore, while the Internal Revenue Service is barred from assessing the payment of an agreed deficiency after the running of the period of limitation for assessment, the

advance payment of the deficiency in the instant case does not constitute an overpayment of tax so as to entitle the taxpayer to a refund.[6] We base this conclusion on Rev. Rul. 85-67, 1985-1 C.B. 364, wherein the taxpayer paid the amount of the deficiency, plus interest, following examination of the taxpayer's income tax return. The Service received the payment of tax and interest within the period prescribed for assessment by section 6501(a) of the Code but failed to assess during that period. The taxpayer filed a claim for refund on the basis that the tax was not timely assessed and, thus, was not owed.

In its ruling, the Service noted that a taxpayer may be liable for, and make a payment of, tax, even though the tax has not been assessed, citing section 6213(b)(4) of the Code and section 301.6213-1(b)(3) of the Regulations on Procedure and Administration. The ruling stated:

> Where taxes and interest legally due have been paid before the expiration of the period of limitations for assessment, as in the subject case, they cannot be recovered by the taxpayer merely because they have not been formally assessed. Crompton and Knowles Loom Works v. White, 65 F.2d 132 (1st Cir. 1933), cert. denied 290 U.S. 669 (1933).

The Service distinguished the facts in Rev. Rul. 85-67, supra, from those of Rev. Rul. 74-580, 1974-2 C.B. 400, which holds that payments of tax assessed and paid after the expiration of the period of limitations for assessment are overpayments. Further, citing Lewis v. Reynolds, 284 U.S. 281 (1932), the ruling emphasized that "the expiration of the period of limitations does not bar the Government from retaining payments already received when they do not exceed the amount which might have been properly assessed and demanded."

Under the facts of the instant case, we believe that a payment has been made, rather than a remittance. Some courts has adopted a per se rule, holding that until a deficiency is assessed, a remittance made after the return is a deposit. Other courts, however, such as the Court of Appeals for the Third Circuit, the circuit in which the instant taxpayer is domiciled, have held that the taxpayer's intent is determinative, and a voluntary remittance of an uncontested tax liability is a

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[6] We do not need to reach the issue of whether a valid assessment agreement was signed in light of the fact that payment was made simultaneously with the submission of such form.

payment. See, e.g., Binder v. United States, 590 F.2d 68 (3rd Cir. 1979); Fortugno v. Commissioner, 352 F.2d 429 (3rd Cir. 1965).

Because the payment has been made and collected within the original period for assessment in this case, we conclude that sections 6401 and 6402 do not apply.

Please contact Robin W. Denick of this office at (410) 962-3153 if you have additional questions.

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